ALEXANDER L. STEVAS
CLERK

No. 80-1487

IN THE

Supreme Court of the United States

BETTY SANDER HARVEY,

Petitioner

vs.

CHARLES D. CONNOR,

Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether this Court has *certiorari* jurisdiction where a due process contention was never addressed or decided by the state courts.

2. Whether dismissal of a complaint by a state court for a plaintiff's failure to file it within the statutory limitation period for such actions, violates due process and equal protection.

3. Whether a civil litigant has a Fourteenth Amendment procedural due process claim where she asserts she was compelled to litigate *pro se* because of her inability to obtain or hold private counsel.

4. Whether a litigant in a state proceeding is denied her Seventh Amendment right because the court dismissed her suit for failure to comply with the applicable statute of limitations, although she had asked for a jury trial.

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REASONS WHY THE WRIT SHOULD BE DENIED

I

THE QUESTIONS PRESENTED BY PETITIONER WERE NEVER ADDRESSED OR DECIDED BY THE STATE COURTS; THOSE QUESTIONS THEREFORE CANNOT NOW BE REVIEWED BY THIS COURT UNDER ITS CERTIORARI JURISDICTION

(1)

Petitioner claims that the decisions of the State courts dismissing her legal malpractice complaint on Illinois statute of limitations grounds somehow violate substantive and procedu-

ral due process, equal protection and the Seventh Amendment. However, as the record demonstrates, the trial court and the Illinois Appellate Court did not address or decide these issues. In part this is because Petitioner attempted, as she now attempts, to convert what are essentially non-federal, state law issues into constitutional ones. Also, Petitioner's "shotgun" approach to this case obscures just what her constitutional claims are, despite all reasonable efforts to give her the benefit of the doubt.

In accordance with its long established and unquestioned rule, this Court has no jurisdiction to review a federal question unless it is both raised *and decided* in the state courts. *Crowell* v. *Randell,* 35 U. S. (10 Pet.) 368, 391 (1836); *Cardinale* v. *Louisiana,* 394 U. S. 437, 438 (1969). For whatever reason, the Illinois courts did not at all deal with Petitioner's constitutional contentions. As a result, Petitioner is barred from raising these contentions in this Court. *Herndon* v. *Georgia,* 295 U. S. 441, 443 (1935); *Beaty* v. *Richardson,* 276 U. S. 599 (1928).

(2)

Petitioner is barred from raising her constitutional arguments in the Court for still another reason. This Court will not review a state court judgment based on an independent non-federal or state ground. *Murdock* v. *Memphis,* 87 U. S. (20 Wall.) 590, 636 (1874); *Berea College* v. *Kentucky,* 211 U. S. 45, 53 (1908); *Herb* v. *Pitcairn,* 324 U. S. 117, 125-126 (1944). In this case, it is abundantly clear from reading the opinion of the Illinois Appellate Court that the sole ground on which the decision is based is Petitioners' failure to comply with the applicable Illinois five-year statute of limitations. Indeed, at page 8, Petitioner appears to concede this when she asserts that the Illinois courts, by dismissing her complaint, engaged in a "misapplication of the wrong statute of limitations."

For these reasons, the Petition for Writ of Certiorari must be denied.

II

PETITIONER'S CLAIM OF VIOLATIONS OF SUBSTANTIVE AND PROCEDURAL DUE PROCESS, EQUAL PROTECTION AND THE SEVENTH AMENDMENT ARE UTTERLY DEVOID OF MERIT

Although somewhat confused, Petitioner seems to argue on the merits that the dismissal of her complaint by the Illinois courts for failure to comply with the requirements of the applicable five year statute of limitations violates substantive and procedural due process, equal protection and the Seventh Amendment. She emphasizes not only the dismissal order but her *pro se* status, as well as her alleged inability to obtain counsel to represent her. In essence, her constitutional argument for Writ of Certiorari consists of the following:

> For where complaints can be removed from adjudication of issues by a jury through the improper granting of Motion to Dismiss, achieved by misapplication of the wrong statute of limitations . . . by courts that wink at fraud, mold the law to suit their purposes and pre-empt the prerogatives of the jury . . . who indeed can be secure in his property or person. (Pet., p. 8)

(1)

What Petitioner calls a substantive due process argument really amounts to a claim that the Illinois Appellate Court's decision affirming the dismissal of her complaint on limitations grounds has no basis in law. However, this simply means that Petitioner believes the Illinois courts erred in dismissing her complaint. Nowhere does she clearly identify the constitutional issue raised by the Illinois courts' decisions, beyond an unexplained assertion of substantive due process.

This is not surprising for there is no tenable substantive due process claim here whatever.

Clearly, the Illinois courts' decisions are not arbitrary or irrational, but are rather based on correct and reasonable interpretations of state law. *Nebbia* v. *New York*, 291 U. S. 502 (1934); *Ferguson* v. *Skrupa*, 372 U. S. 726 (1963). But even assuming *arguendo* that the Illinois courts erred on the limitations issue, in no way does this amount to a substantive due process violation. Petitioner blithely attempts to convert an issue of state law into one of substantive due process. Yet all the extensive references to fraud in her Petition relate, in fact, to the five-year Illinois limitations period—this is state law, not substantive due process. *Day-Brite Lighting, Inc.* v. *Missouri*, 342 U. S. 421 (1952); *Williamson* v. *Lee Optical Co.*, 348 U. S. 483 (1955).

(2)

Petitioner's procedural due process claim is similarly frivolous. Petitioner apparently argues that her constitutional rights were violated because she was "forced" to sue *pro se*! In this regard she points out that numerous lawyers allegedly refused to assist her in pursuing this legal malpractice claim. But this Court has never even come close to holding that a civil plaintiff has a due process right to counsel. Indeed, to the contrary, this Court has held that even indigent plaintiffs unable to pay court costs do not have an unqualified right of access to the courts in civil cases. *United States* v. *Kras*, 409 U. S. 434 (1973); *Ortwein* v. *Schwab*, 410 U. S. 656 (1973).

Furthermore, the alleged refusal of *private* attorneys to represent Petitioner in this case cannot constitute a Fourteenth Amendment procedural due process violation. Procedural due process applies only to *state action*, and in no sense can the alleged conduct of the private attorneys here constitute state action for Fourteenth Amendment purposes. There is no symbiotic relationship, *Burton* v. *Wilmington Parking Authority*,

365 U. S. 715 (1961); no governmental involvement or encouragement, *Jackson* v. *Metropolitan Edison Co.*, 419 U. S. 345 (1974); and no exclusive governmental function, *Flagg Bros. Inc.* v. *Brooks*, 436 U. S. 149 (1978).

Moreover, it is questionable whether Petitioner in fact had no choice but to proceed *pro se*. On page 4, Petitioner contends she "resorted to acting *pro se* after six lawyers she had retained perpetuated Connor's concealments and aligned themselves with her adversaries." As she develops her argument, however, it becomes quite apparent that she in fact quarreled with her lawyers over legal issues and strategy. This is a far cry from being *forced* to appear *pro se*.

(3)

Little need be said about Petitioner's equal protection argument. For one thing, it appears to be based on Illinois law, not the Fourteenth Amendment. (See page 24 of Petition of Writ of Certiorari.) For another, there is no contention made, as required, that the state somehow *purposefully* discriminated against her. *Washington* v. *Davis*, 426 U. S. 229 (1976); *Arlington Heights* v. *Metropolitan Housing Corp.*, 429 U. S. 252 (1977); *Personnel Administrator* v. *Feeney*, 442 U. S. 256 (1979). Petitioner was not treated differently from other legal malpractice plaintiffs. She simply did not satisfy the applicable Illinois five-year limitations requirement. Clearly, the Illinois courts had a rational basis for such treatment premised on the application of the relevant statute of limitations to Petitioner's complaint. *New Orleans* v. *Dukes*, 427 U. S. 297 (1976); *Massachusetts Board of Retirement* v. *Murgia*, 427 U. S. 307 (1976).

(4)

Finally, Petitioner's claim of a Seventh Amendment violation stemming from the dismissal of her complaint is equally meritless. First, the Seventh Amendment does not directly apply to the states. *Minneapolis & St. Louis R. R. Co.* v. *Bombolis,* 241 U. S. 211 (1916). Second, even if it did, Petitioner's argument amounts to making the following rather remarkable assertion: *where a plaintiff asks for a jury trial, the Seventh Amendment prevents a court from dismissing a complaint for failure to comply with an applicable statute of limitations.* Petitioner utterly ignores the fact that a jury has no Seventh Amendment function to perform where a complaint is dismissed on a limitations ground because the complaint's allegations are taken as true for this purpose.

The foregoing discussion of substantive and procedural due process, equal protection and Seventh Amendment issues demonstrates convincingly that Petitioner is challenging the Illinois Appellate Court's decision in this case on state law grounds alone. Her constitutional arguments are but transparent attempts to convert her state law grounds into federal constitutional claims in order to argue to this Court that it should exercise its certiorari jurisdiction. However, there is no legal basis whatever for so doing.

For these additional reasons, the Petition for Writ of Certiorari should be dismissed.

CONCLUSION

The Petition for Writ of Certiorari is totally devoid of merit.

In the first place, the Illinois courts did not address Petitioner's constitutional arguments. She therefore cannot raise them in this Court.

Secondly, the state court judgment is based exclusively on an independent, non-federal state ground.

Petitioner's substantive due process arguments are equally unmeritorious. She does not clearly identify any constitutional issue, but simply asserts that she was denied substantive due process. This obviously is not enough.

All in all, this case merely involves the application by the Illinois courts of an Illinois limitations statute. It involves no federal question whatever.

The Petition for Writ of Certiorari must be denied.

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